ROLAND W. BURRIS
Attorney General
of Illinois
100 West Randolph Street
Chicago, IL 60601
(312) 814-2235

PAMELA CARTER
Attorney General
of Indiana
219 State House
Indianapolis, IN 46204
(317) 232-6207

BONNIE J. CAMPBELL
Attorney General
of Iowa
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5164

ROBERT T. STEPHAN
Attorney General
of Kansas
2nd Floor Kansas Judicial Center
Topeka, KS 66612
(913) 296-2215

CHRIS GORMAN
Attorney General
of Kentucky
State Capitol, Room 116
Frankfort, KY 40601
(502) 564-7600

RICHARD P. IEYOUB
Attorney General
of Louisiana
P.O. Box 94095
Baton Rouge, LA 70804
(504) 342-7013

MICHAEL E. CARPENTER
Attorney General
of Maine
State House Building
Augusta, ME 04333
(207) 626-8800

SCOTT HARSHBARGER
Attorney General
of Massachusetts
One Ashburton Place
Boston, MA 02061
(617) 727-2200

FRANK J. KELLEY
Attorney General
of Michigan
P.O. Box 30212
Lansing, MI 48909
(517) 373-1124

HUBERT H. HUMPHREY III
Attorney General
of Minnesota
102 State Capitol
St. Paul, MN 55155
(612) 296-6196

MIKE MOORE
Attorney General
of Mississippi
P.O. Box 220
Jackson, MS 39205
(601) 359-3860

JEREMIAH "JAY" NIXON
Attorney General
of Missouri
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

JOSEPH P. MAZUREK
Attorney General
of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620
(406) 444-2026

DON STENBERG
Attorney General
of Nebraska
2115 State Capitol
Lincoln, NB 68509
(402) 471-2682

FRANKIE SUE DEL PAPA
Attorney General
of Nevada
Capitol Complex
Carson City, NV 89710
(702) 687-4170

JEFFREY R. HOWARD
Attorney General
of New Hampshire
25 Capitol Street
Concord, NH 03301
(603) 271-3655

DEBORAH T. PORITZ
Attorney General
of New Jersey
Department of Law
and Public Safety
Richard J. Hughes
Justice Complex
25 Market Street
Trenton, NJ 08625
(609) 984-6500

TOM UDALL
Attorney General
of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6000

G. OLIVER KOPPEL
Attorney General
of New York
The Capitol
Albany, NY 12204
(518) 474-8101

MICHAEL F. EASLEY
Attorney General
of North Carolina
Department of Justice
P.O. Box 629
Raleigh, NC 27602
(919) 733-3377

SUSAN B. LOVING
Attorney General
of Oklahoma
State Capitol Building
Rm. 112
Oklahoma City, OK
73105-4894
(405) 521-3921

THEODORE R.
KULONGOSKI
Attorney General
of Oregon
100 Justice Building
Salem, OR 97310
(503) 378-4402

ERNEST D. PREATE, JR.
Attorney General
of Pennsylvania
16th Floor Strawberry
Square
Harrisburg, PA 17120

PEDRO R. PIERLUISI
Attorney General
of Puerto Rico
Puerto Rico Department
of Justice
Box 192
San Juan, PR 00902
(809) 721-7700

JEFFREY B. PINE
Attorney General
of Rhode Island
72 Pine Street
Providence, RI 02903
(401) 274-4400

T. TRAVIS MEDLOCK
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211

MARK BARNETT
Attorney General
of South Dakota
500 East Capitol Avenue
Pierre, SD 57501
(605) 773-3215

CHARLES BURSON
Attorney General and
Reporter of Tennessee
500 Charlotte Avenue
Nashville, TN 37243
(615) 741-6494

DAN MORALES
Attorney General
of Texas
Capitol Station
P.O. Box 12548
Austin, TX 78711
(512) 463-2191

JAN GRAHAM
Attorney General
of Utah
State Capitol, Room 236
Salt Lake City, UT 84114
(801) 538-1326

JEFFREY L. AMESTOY
Attorney General
of Vermont
109 State Street
Montpelier, VT 05609
(802) 828-3171

ROSALIE SIMMONDS
BALLENTINE
Attorney General
-of the Virgin Islands
8050 Kronprindsens Gades
S.T.V.I.
St. Thomas, VI 00802
(809) 774-5666

JAMES S. GILMORE, III
Attorney General
of Virginia
101 North Eighth Street
Richmond, VA 23219
(804) 786-2071

CHRISTINE O. GREGOIRE
Attorney General
of Washington
905 Plum Street
P.O. Box 40100
Olympia, WA 98504
(206) 753-6245

DARRELL V. MCGRAW JR.
Attorney General
of West Virginia
State Capitol
Charleston, WV 25305
(304) 558-2021

JAMES E. DOYLE
Attorney General
of Wisconsin
P.O. Box 7857
Madison, WI 53707
(608) 266-1221

JOSEPH B. MEYER
Attorney General
of Wyoming
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE CHIEF JUSTICE'S OPINION FOR THE COURT IN *BRECHT* IS CORRECT IN HOLDING THAT *KOTTEAKOS* ASSIGNS THE BURDEN TO THE PETITIONER TO SHOW ACTUAL PREJUDICE 4

II. THE NATURE OF COLLATERAL REVIEW DICTATES THAT THE BURDEN OF PROVING ACTUAL PREJUDICE SHOULD FALL ON THE HABEAS PETITIONER 13

A. Collateral And Direct Review Serve Distinct Functions 14

B. The Historic Meaning Of Habeas Corpus And The Principles Of Federalism And Comity Make The Case For Allocating To The Habeas Petitioner The Burden Of Proof On The Issue Of Harmless Error 18

III. THE PLENARY REVIEW MANDATED BY *KOTTEAKOS* ENSURES A FAIR DETERMINATION OF ACTUAL PREJUDICE 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Nelson,
390 U.S. 523 (1968) 14

Arizona v. Fulminante,
499 U.S. 279 (1991) 12

Barefoot v. Estelle,
463 U.S. 880 (1983) 15, 16

Bibbins v. Dalsheim,
21 F.3d 13 (2d Cir. 1994) 5

Boyde v. California,
494 U.S. 370 (1990) 3, 13

Brecht v. Abrahamson,
113 S. Ct. 1710 (1993) . . . . . *passim*

Brewer v. Williams,
430 U.S. 387 (1977) 19

Brown v. Allen,
344 U.S. 443 (1953) 19

Chapman v. California,
386 U.S. 18 (1967) . . . . . *passim*

Coleman v. Thompson,
501 U.S. 722 (1991) 16, 18

Cumbie v. Singletary,
991 F.2d 715 (11th Cir. 1993) 23

Douglas v. California,
372 U.S. 353 (1963) 17

Engle v. Isaac,
456 U.S. 107 (1982) 19-21

Estelle v. McGuire,
112 S. Ct. 475 (1991) 3, 15

Fay v. Noia,
372 U.S. 391 (1963) 19

Gideon v. Wainwright,
372 U.S. 335 (1962) 19

Griffith v. Kentucky,
479 U.S. 314 (1987) 17

Harris v. Reed,
489 U.S. 255 (1989) 20

Henry v. Estelle,
993 F.2d 1423 (9th Cir. 1993) 5, 23

Jackson v. Virginia,
443 U.S. 307 (1979) 16

Kotteakos v. United States,
328 U.S. 750 (1946) . . . . . *passim*

Kuhlman v. Wilson,
477 U.S. 436 (1986) 19

Lewis v. Jeffers,
497 U.S. 764 (1990) 15

Libby v. Duval,
19 F.3d 733 (1st Cir. 1994) 5

Lowery v. Collins,
996 F.2d 770 (5th Cir. 1993) 5

Mackey v. United States,
401 U.S. 667 (1971) 15

McClesky v. Zant,
499 U.S. 467 (1991) 18, 20

Milton v. Wainwright,
407 U.S. 371 (1972) 14

Mullaney v. Wilbur,
421 U.S. 684 (1975) 16

O'Neal v. Morris,
3 F.3d 143 (6th Cir. 1993) 2

Pennsylvania v. Finley,
481 U.S. 551 (1987) 15, 17

Reed v. Farley,
62 U.S.L.W. 4564 (1994) 15

Robinson v. Arvonio,
___ F.3d ___, 1994 WL 259746 (3rd Cir. 1994) 5

Rose v. Clark,
478 U.S. 570 (1986) 14

Rose v. Hodges,
423 U.S. 19 (1975) 15

Rose v. Lundy,
455 U.S. 509 (1982) 15

Rose v. Mitchell,
443 U.S. 545 (1979) 19

Sandstrom v. Montana,
442 U.S. 510 (1979) 2, 3, 13

Sawyer v. Whitley,
112 S.Ct. 2514 (1992) 18

Stone v. Powell,
428 U.S. 465 (1976) 15

Stoner v. Sowders,
997 F.2d 209 (6th Cir. 1993) 5

Strickland v. Washington,
466 U.S. 668 (1984) 18

Sullivan v. Louisiana,
113 S. Ct. 2078 (1993) 13

Sunal v. Large,
332 U.S. 174 (1947) 14

Teague v. Lane,
489 U.S. 288 (1989) 15, 17, 20

United States v. Frady,
456 U.S. 152 (1982) 17

United States v. Lane,
474 U.S. 438 (1986) 10, 12

Wainwright v. Sykes,
433 U.S. 72 (1977) 15

Wright v. West,
112 S.Ct. 2482 (1992) 14, 19

Yates v. Evatt,
500 U.S. 391 (1991) 14, 22

STATUTES AND LEGISLATIVE MATERIALS:

28 U.S.C. § 2254 . . . . . 15, 16

OTHER MATERIALS:

Blume, John H. and Garvey, Stephen P.,
Harmless Error In Federal Habeas Corpus After Brecht v. Abrahamson,
35 William and Mary L. Rev. 163 (1993) 6

Goldberg, Steven H., *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. Law & Criminology 421 (1980) 8

Goldblatt, Craig, *Harmless Error As Constitutional Common Law: Congress's Power To Reverse Arizona v. Fulminante*, 60 Univ. Chi. L. Rev. 985 (1993) 8

Liebman, James S., *Federal Habeas Corpus Practice And Procedure* (1988) 19

Webster's *New Collegiate Dictionary* (1981) 16

No. 93-7407

In the

Supreme Court of the United States

October Term, 1994

ROBERT O'NEAL,

Petitioner,

v.

FRED MCANINCH, WARDEN,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF THE STATES OF MARYLAND, ET AL.,[1] AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE[2]

At issue in this case is the allocation of the burden of proof to establish that trial error was harmless on habeas review of state criminal convictions under *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). The Court must clarify

[1] States joining this brief are listed on the cover and their respective counsel are listed on the inside cover.

[2] This brief is submitted by the amici states through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

whether the party bearing that burden is the state or the habeas petitioner. The answer to this question necessarily implicates the twin interests of concluded litigation and the proper scope of federal habeas review of state criminal convictions, interests of no small concern to the amici states.

Resolution of the question presented will affect not only that principle upon which the co-existence between the states and the federal courts depends, that is, the principle of organization otherwise dubbed "federalism," but also the resources of state criminal justice systems already feeling the strain engendered by collateral review of convictions. The states, of course, are the entities that bear the brunt of the costs, be they economic or social, of habeas review of state prisoner claims; hence, this amicus brief in which amici strongly urge the Court to allocate to the habeas petitioner the obligation of proving that a trial error actually prejudiced the jury verdict.

STATEMENT OF THE CASE

In 1981, Petitioner Robert O'Neal was tried by a jury in an Ohio state court and convicted of the aggravated murder, aggravated robbery, and kidnapping of Henry Podborny as part of a conspiracy. *O'Neal v. Morris*, 3 F.3d 143, 144 (6th Cir. 1993). O'Neal was sentenced to life imprisonment. After exhausting his state remedies, O'Neal sought habeas corpus relief on, *inter alia*, the grounds that the trial court's instructions allowed the jury to impute the intent to kill of other conspirators to O'Neal, in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979); and that the prosecutor's closing argument also improperly suggested that the prosecution need not make an independent showing of intent as to each defendant for conspiracy liability to attach. *O'Neal*, 3 F.3d at 145, 147. The district court granted habeas relief.

The United States Court of Appeals for the Sixth Circuit reversed. The Sixth Circuit held that petitioner's *Sandstrom* claim failed the *Boyde* test:[3] the jury instruction did not constitute trial error. *Id.* at 147. The appeals court did find error as to the prosecutor's argument, but held that error was harmless. *Id.* Citing *Brecht v. Abrahamson* for the proposition that habeas relief is not warranted unless the *habeas petitioner* establishes that federal constitutional trial error had a substantial and injurious effect or influence on the jury's verdict, the Sixth Circuit held that O'Neal failed to meet his burden of establishing actual prejudice. *Id.* at 148.

O'Neal then filed a petition for writ of certiorari with this Court, raising four issues. *See* Cert. Pet. at (i). On April 4, 1994, the Court granted review solely on question number two, the question concerning the allocation of the burden of proof for establishing harmless error.

SUMMARY OF ARGUMENT

This case presents a question left in doubt by the Court's decision in *Brecht v. Abrahamson*: whether under the *Kotteakos* standard held applicable in *Brecht*, the petitioner bears the burden of proof on habeas review to show that trial error substantially prejudiced the verdict. Amici respectfully submit that the burden of proof is properly assigned to petitioner under this standard. Amici argue: first, that the Chief Justice's opinion for the Court in *Brecht* is correct in holding that the *Kotteakos* test allocates to the petitioner the

---

[3] In *Estelle v. McGuire*, 112 S. Ct. 475 (1991), the Court held that the test for error in jury instructions is that set out in *Boyde v. California*, 494 U.S. 370 (1990): "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, 112 S. Ct. at 482 and n.4, quoting *Boyde*, 494 U.S. at 380.

burden of proving actual prejudice in all cases where the error is amenable to harmless error analysis; second, that allocation of the burden to the petitioner on habeas, while the state retains the burden on direct review to show that the error was harmless beyond a reasonable doubt, is consistent with the well-established distinction between direct and habeas review; and third, that the plenary review mandated by *Kotteakos* safeguards the petitioner in that in no case will the burden of proof predetermine the outcome.

ARGUMENT

I. THE CHIEF JUSTICE'S OPINION FOR THE COURT IN *BRECHT* IS CORRECT IN HOLDING THAT *KOTTEAKOS* ASSIGNS THE BURDEN TO THE PETITIONER TO SHOW ACTUAL PREJUDICE.

In *Brecht v. Abrahamson*, the Chief Justice, writing for the Court, held that in federal habeas the burden of proof to establish that error was not "harmless" rests with the habeas petitioner. *Brecht*, 113 S.Ct. at 1722. The Court's opinion adopted the test for harmless error set out in *Kotteakos v. United States*, 328 U.S. 750 (1946), "under which an error requires reversal only if 'it had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 113 S.Ct. at 1718, quoting *Kotteakos*, 328 U.S. at 776. The Chief Justice's opinion for the Court clearly states that "under this standard, habeas petitioners ... are not entitled to habeas relief based on trial error *unless they can establish* that it resulted in 'actual prejudice.'" *Brecht*, 113 S.Ct. at 1722 (emphasis added). The majority of federal courts to rule on the issue have followed this express language and allocated the burden

of proof to the petitioner,[4] except the First Circuit, *see Libby v. Duval*, 19 F.3d 733, 739-40 n. 15 (1st Cir. 1994) and the Sixth Circuit, which is split on this question. In this case, the Sixth Circuit placed the burden on O'Neal, 3 F. 3d at 147; but in *Stoner v. Sowders*, 997 F.2d 209 (6th Cir. 1993), the Sixth Circuit allocated the burden of proving the error was harmless to the state. *Id.* at 213.

The minority view is based on Justice Stevens' concurrence in *Brecht*. Although Justice Stevens concurred in the Court's opinion as well as in its judgment, he wrote separately to state that he supported adoption of the *Kotteakos* standard because first, that standard requires de novo review, and second, in his view, it places the burden on the state to explain why the errors were harmless. *Brecht*, 113 S.Ct. at 1723 (Stevens, J., concurring).[5]

---

[4] *Robinson v. Arvonio*, ___ F.3d ___, 1994 WL 259746 (3rd Cir. 1994); *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994); *Smith v. Dixon*, 14 F.3d 956, 975 (4th Cir. 1994) (*en banc*); *Tague v. Richards*, 3 F.3d 1133, 1140 (7th Cir. 1993); *Castillo v. Stainer*, 997 F.2d 669, 669 (9th Cir. 1993), *modifying* 983 F.2d 145 (9th Cir. 1992); *Lowery v. Collins*, 996 F.2d 770, 773 (5th Cir. 1993); *Henry v. Estelle*, 993 F.2d 1423, 1427 (9th Cir. 1993); *Cumbie v. Singletary*, 991 F.2d 715, 725 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 650 (1994).

[5] Justice White's dissent in *Brecht* (joined by Justices Blackmun and Souter) views *Kotteakos* as placing the burden of proof on the petitioner. *Brecht*, 113 S.Ct. at 1727 (White, J., dissenting). Justice O'Connor's separate dissent generally suggests agreement with Justice Stevens' concurrence. *Id.* at 1731 (O'Connor, J., dissenting). Thus, different majorities of the Court in *Brecht* agreed that (1) *Kotteakos* provides the appropriate standard for habeas cases (the Chief Justice and Justices Stevens, Scalia, Kennedy and Thomas); and (2) that *Kotteakos* places the burden of proof on the petitioner (the Chief Justice and Justices Blackmun, White, Scalia, Kennedy, Souter, and Thomas).

Amici states respectfully submit that the Chief Justice's opinion for the Court in *Brecht* is correct in holding that the *Kotteakos* test places the burden on the petitioner to show that the error substantially affected the jury verdict, and Justice Stevens' concurrence is mistaken in its contrary reading of *Kotteakos* on the burden issue.[6] A careful reading of *Kotteakos* itself, and the plain language and historical meaning of the federal harmless error statute on which the *Kotteakos* test is based, compel this conclusion. Additionally, Justice Stevens' reading of *Kotteakos* and his reading of the legislative history of the federal harmless error statute rest on a distinction between "technical" and "other" potentially harmless trial error that cannot be found in the statute or in *Kotteakos* and has been repeatedly rejected by the Court's harmless error jurisprudence.

The Chief Justice's opinion for the Court in *Brecht* explains that the *Kotteakos* test is grounded in the federal harmless error statute and specifically, that *Kotteakos* equates the statutory definition of harmless error: error that does not affect the "substantial rights" of the parties -- with the standard the opinion articulates: error that does not have a "substantial and injurious effect" on the jury verdict. As the Court's opinion in *Brecht* explicitly recognizes, *Kotteakos* construed the statutory phrase "substantial rights" to mean "substantial effect on the verdict." *Brecht*, 113 S. Ct. at 1718, n. 7. In other words, it is the reliability of the jury

---

[6] One law review article has suggested that the Chief Justice's opinion for the Court in *Brecht* did not properly consider the issue of burden of proof and is therefore not entitled to full weight on that issue. John H. Blume and Stephen P. Garvey, *Harmless Error In Federal Habeas Corpus After Brecht v. Abrahamson*, 35 William and Mary L. Rev. 163, 173 (1993). Given Justice Stevens' concurrence, there can be little doubt that both the majority and the dissents in *Brecht* were quite aware of the issue and that the opinions reflect the considered views of the respective Justices.

verdict, and the "rights" of both state and the defendant ("the parties") to a reliable verdict, that are the proper focus of harmless error analysis, not the specific constitutionally-guaranteed right of the defendant allegedly infringed by trial error. Similarly, 'substantial" rights refers to the magnitude of the effect of the error on the reliability of the outcome, not to the "importance" of the specific Bill of Rights guarantee (or statutory protection) infringed by the alleged error.

This reading of *Kotteakos* is fully supported by the express language of that case. Justice Rutledge's eloquent opinion for the Court paraphrases the federal harmless error rule that the Court adopts as follows: "It comes down on its face to a very plain admonition: Do not be technical, where technicality does not really hurt the party whose *rights in the trial and in its outcome* the technicality affects." 328 U.S. at 760 (emphasis added). This language reads the statutory phrase "substantial rights" as referring to the parties' rights in the reliability of the verdict and accordingly holds that the statutory definition of harmless error: error which does not affect the "substantial rights" of the parties -- means error which does not substantially prejudice the reliability of the result.

In the very next sentence, *Kotteakos* goes on to note first, that the legislative history of the statute supports its plain language in defining "harmless error" as only that error which does not "affect the parties' substantial rights" -- i.e. does not substantially prejudice the reliability of the verdict; second, that there remains a limited category of error to which the statute and harmless error analysis do not apply; and third, that the burden of showing that error is not harmless, if harmless error analysis applies at all, rests with the defendant.

"[T]he purpose of the bill ...was... to ...'cast upon the party seeking a new trial the burden of showing that any technical errors he may complain of have affected his substantial rights, otherwise they are to be disregarded.' H.R. Rep. No. 913, 65th Cong. 3d Sess. 1. But that this burden does not extend to all errors appears from the statement which follows immediately. 'The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights [in the verdict], the burden of sustaining the verdict will notwithstanding this legislation rest upon the one who claims under it.'" *Ibid.*

Kotteakos at 760.[7]

---

[7] *Kotteakos* supports its analysis by tracing the origins of the harmless error doctrine. *Id.* at 758-63. The doctrine was developed in the context of direct review. Its history began in England. The doctrine was created in response to the Exchequer Rule. Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. Law & Criminology 421, 422 (1980). *See also* Craig Goldblatt, *Harmless Error As Constitutional Common Law: Congress's Power To Reverse Arizona v. Fulminante*, 60 Univ. Chi. L. Rev. 985, 993-94 (1993). Under that rule, errors which occurred during the trial were held presumptively prejudicial and cause for reversal. *Id.*

The rule resulted in much overcrowding in the English courts; litigation seemed to survive until the parties expired. Goldberg, *supra* at 422. The English then created a harmless error rule for civil litigation which prevented reversal absent substantial wrong. *Id.* The Exchequer Rule was eventually imported to the United States and as a consequence, the American courts became hostage to the same backlog and delay in cases experienced by the English courts. *Id.* Despite this detrimental effect on litigation, the American courts persisted in applying the Exchequer Rule, no matter how insignificant the error. *Id.* As the *Kotteakos* Court explained, the courts became "impregnable citadels of technicality." 328

Justice Stevens' concurrence in *Brecht* cites this last-quoted passage from *Kotteakos* for the contrary proposition: that *Kotteakos* imposes the burden of proof on the state to show that trial error is harmless unless the specific right allegedly infringed by trial error is "merely technical." *Brecht*, 113 S. Ct. at 1723-24 (Stevens, J. concurring).[8] This interpretation, which focuses on a distinction between types of constitutional or statutory rights and corresponding varieties of harmless error analysis is not faithful to the plain language of *Kotteakos* and the statute, nor does it comport with the historical meaning or the logic of these authorities.

As noted, the passage quoted by Justice Stevens follows immediately after Justice Rutledge's paraphrase of the harmless error statute: "do not be technical - don't reverse convictions where the error doesn't substantially affect the verdict." That context makes clear that Justice Stevens is misguided in relying on the word "technical" in the 1919 statute to create two types of harmless error analysis. Rather,

---

U.S. at 759.

Lawyers were not at all shy about purposely planting error in the record as a means of redressing a losing verdict. Goldberg, *supra* at 422. Criminal trials in particular fell victim to such tactics. *Kotteakos*, 328 U.S. at 759. Finally, many members of the bar, some judges, and legal scholars were moved to seek remedial legislation which resulted in "harmless error" legislation in nearly all jurisdictions. *Ibid* and n. 12, *see also* Goldberg, *supra*, at 422. Congress enacted a federal harmless error statute in 1919. *Act of February 26*, 1919 c. 48, 40 Stat. 1181, *see Kotteakos*, 328 U.S. at 758. The statute commanded federal appellate courts to ignore errors that did not "affect the substantial rights of the parties." 28 U.S.C. § 391 (1925-26 ed.), Congress reenacted the harmless error rule as 28 U.S.C. § 2111 in 1949, "tinkering with the language" but leaving the meaning intact. *Brecht*, 113 S. Ct. at 1718, n. 7.

[8] Justice Stevens categorizes constitutional rights as "never technical." *Brecht*, 113 S. Ct. at 1723-24.

"technical" is shorthand for the conclusion that the error does not warrant reversal.

The historical background of the key phrases further clarifies that the *Kotteakos* test provides only one harmless error analysis for all potentially harmless error, and it places the burden on the petitioner. In his concurring opinion in *United States v. Lane*, 474 U.S. 438 (1986) Justice Brennan explained the historical background of the key statutory phrase from which the *Kotteakos* test is derived.

> Reference to whether error "affected the substantial rights of the parties" was not invented by Congress in 1919. The phrase was commonly used by courts throughout the 19th century . . . [A]s used by these courts, error which "affected the substantial rights of the parties" was generally understood to refer, not to errors respecting a particular class of rights, but rather to any error which affected the fairness of the trial as a whole by calling into question the reliability of the result. [citations omitted]

Lane, 474 U.S. at 455-56.

Justice Brennan goes on to discuss the legislative history of the statutory harmless error rule, noting that Congress likewise intended a focus on the effect of the error on the reliability of the outcome, and not segregation of different classes of trial error for different harmless error analysis. *Id.* at 457-58. Indeed, Congress later deleted the obsolete (and in the present day confusing) word "technical" from the harmless error statute without changing the meaning of the statute, nor does this change affect the *Kotteakos* test. *See Lane*, 474 U.S. at 459; *Brecht*, 113 S.Ct. at 1718, n.7.

Justice Brennan concludes that consistent with this statutory interpretation, *Kotteakos* derives from the statute a single harmless error test, which focuses on the outcome, and does not distinguish between "technical" and "substantial" guarantees.

> In *Kotteakos*, we expressly rejected the argument that the 1919 Act required a determination of what are only technical, what substantial rights; and what really affects the latter hurtfully . . . . We held instead that the Act's command to disregard errors unless they 'affect the substantial rights of the parties' was a command not to overturn a conviction unless, after examining the record as a whole, the court concludes that the error may have had substantial influence on the outcome of the proceeding.

Lane at 458-59.

In summary, the statute and *Kotteakos* subject all error amenable to harmless-error analysis to one test: has the petitioner shown that the error substantially affected the verdict. Neither the statute nor *Kotteakos* distinguishes between "merely technical" error that may or may not be harmless but which places the burden of proof on the petitioner, and some other sort of error that may or may not be harmless but which places the burden of proof on the state, as Justice Stevens would have it.

Moreover, the Court's recent harmless error jurisprudence generally disfavors an approach which categorizes the allegedly infringed Constitutional or statutory guarantee, and applies different rules to each subcategory, in favor of an approach which asks the reviewing court to focus

on the effect of the error on the verdict. In *Chapman v. California*, 386 U.S. 18 (1967), the Court set a standard higher than the federal statute or the *Kotteakos* test for direct review of constitutional error, placing the burden on the state to show "beyond a reasonable doubt" that the error did not affect the verdict. *Id.* at 24. But the Court again rejected a bright-line rule that all constitutional violations require reversal, and instead focused on the effect of the error on the outcome of the trial. *Chapman*, 386 U.S. at 22-23. Similarly, in *Lane*, 474 U.S. at 446, the Court applied the *Kotteakos* test -- did the error substantially affect the verdict -- to errors involving misjoinder raised on direct review. The *Lane* Court rejected the approach of Justice Stevens in that case advocating categorization of rights to determine whether to conduct harmless error analysis and if so, what analysis to conduct. *Lane*, 474 U.S. at 448 n.11 and 449. *See also id.* at 458-59 (Brennan, J., concurring in part and dissenting in part).

Of course, the Court has also consistently recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 567. In other words, the "natural effect [of error as to these rights] is to prejudice a litigant's substantial rights" in the verdict. *Kotteakos*, 328 U.S. at 760. But the Court has consistently resisted allowing the exception to swallow the rule: only those constitutional deprivations that are "structural defects in the constitution of the trial mechanism" have been held not amenable to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 286 (1991) (opinion of the Chief Justice, Part II, for the Court). As the

Court's limited grant of review recognizes, this case presents no such issue.[9]

In summary, amici states maintain that *Kotteakos* imposes the burden of proof on the petitioner and that the opinion of the Chief Justice for the Court in *Brecht* was therefore correct in adopting this burden of proof as part of the *Kotteakos* standard. The contrary reading urged by Justice Stevens' concurrence in *Brecht* is not consistent with either the language or the structure of the federal harmless error statute (either the old or the new version). Nor is it supported by the *Kotteakos* opinion itself or by this Court's subsequent jurisprudence on the issue, because it depends on a distinction between "technical" and "nontechnical" potentially harmless error rejected by these decisions. Amici urge this Court to clarify that the *Kotteakos* standard adopted by the Court in *Brecht* places the burden on the petitioner to show that the error substantially affected the jury verdict as a condition for obtaining habeas relief.

II. THE NATURE OF COLLATERAL REVIEW DICTATES THAT THE BURDEN OF PROVING ACTUAL PREJUDICE SHOULD FALL ON THE HABEAS PETITIONER.

That habeas corpus is not intended to function as a surrogate for direct review is a simple enough proposition. It is a proposition that nonetheless provides the proper focus for

---

[9] The error identified by the Sixth Circuit -- misleading prosecutorial argument -- cannot rise to this level because it is only argument - not an error in the evidence or in the law presented to the jury. As noted, petitioner's *Sandstrom* claim was rejected by the Sixth Circuit on the basis that the jury instructions were not error under *Boyde*, but in any event, such claims have also been held amenable to harmless error analysis. *Sullivan v. Louisiana*, __ U.S. __ 113 S. Ct. 2078, 2082 (1993).

determining the allocation of the burden of proof for establishing that trial error of constitutional dimension was or was not harmful.

A. Collateral And Direct Review Serve Distinct Functions.

In *Brecht*, the court's adoption of the *Kotteakos* standard over the *Chapman* standard[10] was predicated on the notion that the former test:

> is ... better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases.

Brecht, 113 S. Ct. at 1722.

The conclusion that the allocation of the burden of proof for demonstrating harmless error on direct review does not apply on habeas review is likewise deducible from the differences between direct and collateral review. As early as 1947, this Court made clear that the two modes of review are not mirror images. *See Sunal v. Large*, 332 U.S. 174, 178 (1947) (writ of habeas corpus will not be allowed to do service for an appeal). That principle has been echoed over and again, most recently in *Brecht*. 113 S.Ct. at 1712. *See also Wright v. West*, 112 S.Ct. 2482, 2490 (1992) (opinion of

[10] Until the issue was squarely presented in *Brecht*, it was assumed that *Chapman* applied to federal habeas cases. *See, e.g., Yates v. Evatt*, 500 U.S. 391, 404-05 (1991); *Rose v. Clark*, 478 U.S. 570, 579-80 (1986); *Milton v. Wainwright*, 407 U.S. 371, 378 (1972); *Anderson v. Nelson*, 390 U.S. 523, 525 (1968) (per curiam). *See also* John H. Blume & Stephen P. Garvey, *supra* n. 5 at 163. As noted, *Chapman* places the burden of proving harmless error on the state on direct review.

Thomas, J.); *Teague v. Lane*, 489 U.S. 288, 306 (1989) (opinion of O'Connor, J.); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987); *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., dissenting in part and concurring in judgments in part).

As this Court explained in *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), direct review is the channel for challenging a conviction. Once that process comes to closure, a presumption of not only finality but correctness attaches to the conviction and sentence. *Brecht*, 113 S.Ct. at 1719; *Barefoot*, 463 U.S. at 887. It is this presumptively correct and final conviction at which the state prisoner strikes on collateral habeas review. Therefore, the role of habeas corpus is secondary and limited; it is not a forum to relitigate state trials. *Id.*[11]

[11] In conducting habeas review, a federal court is limited to deciding whether a conviction was obtained in violation of the federal Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254; *Estelle v. McGuire*, 112 S. Ct. 475, 479 (1991); *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (per curiam). Violations of state law and procedure which do not infringe specific federal constitutional protections are not cognizable under Section 2254(a). *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). And federal review is further limited: where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his or her trial. *Stone v. Powell*, 428 U.S. 465, 494 (1976). Other rules requiring the exhaustion of all available state remedies and eliminating claims procedurally defaulted in state court limit the claims cognizable on habeas. *See, e.g., Reed v. Farley*, 62 U.S.L.W. 4564 (1994) (defendant's failure to object to violation of time limitation for trial pursuant to Interstate Agreement on Detainer renders claim non-cognizable on federal habeas review); *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (petition containing unexhausted claims mandates dismissal of entire petition or deletion of unexhausted claim). *See also Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (adequate and independent finding by state court of procedural default will bar federal habeas review of federal claim unless

Put in the simplest of terms, the difference between collateral and direct review lies in the fact that the latter mode of review is concerned with reexamining the *judgment* of conviction. *Barefoot*, 463 U.S. at 887. This is not the case in habeas. *Coleman v. Thompson*, 501 U.S. 722, 738 (1991). When a federal court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254, the court does not revisit the question of the petitioner's guilt or innocence; rather, the court determines whether the petitioner is "in custody in violation of the Constitution, or laws, or treaties of the United States." *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5 (1979) (Stevens, J., concurring in judgment). This shift in focus is predicated upon the presumption of correctness that attaches to the conviction once the direct review process is completed.[12]

It follows from the fact that the state conviction has been upheld as presumptively correct, that the burden of rebutting that presumption should be shouldered by the habeas petitioner. Otherwise, the presumption of correctness is rendered meaningless. The presumption has effect only if the habeas petitioner bears the burden of proving that an error of constitutional magnitude resulted in his being actually prejudiced.

That the difference between direct review and collateral review betokens the application of different rules is not a

---

habeas petitioner can show cause for default and consequent prejudice).

[12] A presumption is defined as a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact. Webster's *New Collegiate Dictionary* at 904 (1981). *See also Mullaney v. Wilbur*, 421 U.S. 684, 703 n. 31 (1975) (describing a presumption as procedural device requiring trier of fact to conclude the existence of one fact from proved existence of other facts).

proposition alien to this Court. The Court need look no further than its decision in *Brecht* for an example that the difference between the two modes of review dictate whether a rule governing direct review will also govern collateral review. The Court's decision not to extend the *Chapman* standard to habeas cases was rooted in its history of distinguishing between direct and collateral review. 113 S.Ct. at 1720.

Similarly, in *Teague v. Lane*, 489 U.S. at 305-10 (1989) (opinion of O'Connor, J.), the Court held that new constitutional rules of criminal procedure will seldom have retroactive application to criminal cases on federal habeas, although new rules always have such application to criminal cases on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 320-28 (1987). Likewise, in *Pennsylvania v. Finley*, 481 U.S. at 555-56, the Court held that there is no right to counsel on collateral review, even though the Constitution guarantees the right to counsel on direct appeal. *See Douglas v. California*, 372 U.S. 353, 355 (1963). In *United States v. Frady*, 456 U.S. 152 (1982), the Court again crafted, on collateral review, a rule different from the one applied on direct review. The Court held that while the federal plain error rule applies in determining whether a defendant may raise a claim for the first time on direct appeal, the "cause and prejudice" standard applies in determining whether that same claim may be raised on habeas. *Id.* at 162-69. In this case also, the notion that different rules should apply on direct and collateral review justifies placing upon the habeas petitioner the onus of proving that a trial error was harmful.

Conversely, the net effect that would result from having the state bear the burden of proof in establishing that trial error resulted in no actual prejudice to the state prisoner on both collateral and direct review is to sanction that which was deplored in *Frady*, 456 U.S. at 164, namely, treating the

two modes of review as one and the same. Moreover, allocating the burden of proof to the state on both direct and collateral review is tantamount to a proclamation that the state must prove anew the validity or correctness of the state prisoner's conviction. This is precisely why it is fitting that on collateral review, the state prisoner bear the burden of proving that an error of constitutional magnitude resulted in his being actually prejudiced.

This Court has not hesitated in placing the burden on the habeas petitioner in analogous federal habeas contexts. For example, in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Court placed the burden on the habeas petitioner to show prejudice as a necessary element of a claim of ineffective assistance of counsel. A habeas petitioner must also show prejudice for procedurally defaulting a claim in state court "even in cases in which the alleged constitutional error impaired the truthfinding function of the trial." *Coleman v. Thompson*, 501 U.S. at 739. Likewise, the habeas petitioner must show prejudice with respect to successive claims or claims not previously raised which constitute an abuse of the writ. *Sawyer v. Whitley*, 112 S.Ct. 2514, 2521 (1992); *McClesky v. Zant*, 499 U.S. 467, 491 (1991). There is no good reason why the burden should not be allocated to the habeas petitioner on the issue of whether constitutional trial error substantially and injuriously affected the jury's verdict.

B. The Historic Meaning Of Habeas Corpus And The Principles Of Federalism And Comity Make The Case For Allocating To The Habeas Petitioner The Burden Of Proof On The Issue Of Harmless Error.

Yet another reason counsels in favor of allocating to the habeas petitioner the burden of proving that a trial error

substantially and injuriously influenced the jury's verdict. Allocation of the burden to the habeas petitioner is fully congruent with the historic purpose for which the writ of habeas corpus is made available. The Great Writ is an extraordinary remedy that serves "to guard against extreme malfunctions in the state criminal justice system." *Wright v. West*, 112 S. Ct. at 2490; *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion); *Engle v. Isaac*, 456 U.S. 107, 126 (1982).

The writ's "historic function" is to provide relief in those rare cases where "there are meritorious causes in which habeas corpus is the ultimate and only relief and designed to be such."[13] *Brown v. Allen*, 344 U.S. 443, 501 (1953). *See, e.g., Rose v. Mitchell*, 443 U.S. 545, 559 (1979) (habeas relief granted where discrimination in selection of grand jury established); *Brewer v. Williams*, 430 U.S. 387, 404-06 (1977) (habeas relief granted where police interrogated petitioner and elicited incriminating statements from him in violation of the Sixth Amendment right to counsel); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1962) (writ granted where indigent petitioner was denied right to counsel at his state trial). Given that the writ is a unique and exceptional remedy reserved for those persons whom society has grievously wronged, *Fay v. Noia*, 372 U.S. 391, 440-41 (1963), and given that the state prisoner's conviction has been deemed valid on direct review,

---

[13] Although triggered by criminal prosecutions, the writ is denominated a civil remedy. James S. Liebman, *Federal Habeas Corpus Practice And Procedure* § 2.1 at 3 (1988). The nature of the writ as a prisoner-initiated civil remedy informed by equitable principles, *id.*, is an additional reason to charge the habeas petitioner with the responsibility of proving that a trial error was harmful. Traditionally, in civil proceedings the party bringing the complaint bears the burden of proving injury entitling him or her to the grant of the relief requested. No different rule should apply here.

it stands to reason that on collateral review the burden of proving harmful error should rest with the habeas petitioner.

Beyond that, imposing the burden of proving harmless error on the state on collateral review would ignore important interests that it is this Court's tradition to honor. An animating concern in the Court's habeas jurisprudence has been to ensure that the principles of comity and federalism are respected. *See Brecht*, 113 S. Ct. at 1720. The Court stated in *Teague*, 489 U.S. at 308, that the interests in comity and finality must be considered in determining the proper scope of habeas review. It is undisputed that habeas review potentially undermines the state's significant interest in concluded litigation. *See McClesky*, 499 U.S. at 491; *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting). Moreover, undue federal intrusion into state criminal trials frustrates both the states' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. *Engle*, 456 U.S. at 128. Forcing the state, on both direct and collateral review, to shoulder the burden of proving that a trial error of constitutional dimension was harmless converts collateral review into yet another round of direct review. More importantly, such a rule is incredibly intrusive, for it forces the state to prove anew the validity of a state conviction that has already survived the cold glare of direct review. Faithful adherence to the imperatives of federalism, comity and the historic purpose of the Great Writ, dictates that the burden of proving harmful trial error rest with the habeas petitioner.

Ignoring the principles of federalism and comity would have a practical impact on the states as well. These costs far outweigh the benefit petitioner argues may be derived from a rule under which the burden of establishing harmless error is allocated to the state. It is no secret that habeas review may cost society the right to punish admitted offenders because

retrial is often difficult, if not impossible, due to the passage of time, erosion of memory, and dispersion of witnesses. *Engle*, 456 U.S. at 128. That the state should not be forced to gather forgetful witnesses and moldering evidence for a second trial at every drop of the habeas hat is a legitimate concern. This is no less of a concern in the context of the burden allocation for proving that a trial error was or was not harmless.

As this Court pointed out in *Brecht*, 113 S. Ct. at 1721, there is no statute of limitations governing federal habeas. The habeas petitioner controls the timing of habeas litigation. The longer he waits to bring a claim, the more difficult it becomes for the state to defend against the claim. Conversely, putting the burden of proof on the habeas petitioner forces the petitioner to bring his claim in a more timely fashion. If the petitioner bears the burden of proof, it will be to his advantage to bring his claims as promptly as possible. Such a rule would also help to slam the door on the filing of frivolous claims. Federal courts, like state courts, must be concerned with husbanding judicial resources. Allocating to the habeas petitioner the burden of proof with respect to demonstrating that a trial error was harmful will do much to stem the tide of frivolous prisoner petitions that is sure to result if a contrary rule is adopted.

While some might argue that having the state bear the burden on both direct and collateral review encourages the state's adherence to constitutional rules and procedures, that argument was rejected in *Brecht*, 113 S. Ct. at 1721. It should likewise be rejected here. It simply defies logic to suggest that prosecutors and state courts alike will intentionally flout federal constitutional dictates because they know that the state will not have to prove that a trial error resulted in no actual prejudice to the state prisoner on collateral review. A more than adequate incentive to obey

federal constitutional rules, if any is needed, flows from the threat that the conviction may not pass muster on direct review -- and, as noted below, from the plenary review available on habeas. In sum, the nature of collateral review, the purpose of habeas corpus, and the principles of federalism and comity, as well as common sense, dictate that the habeas petitioner bear the burden of proving that a trial error created a substantial and injurious effect on the jury's verdict sufficient to warrant the grant of habeas relief.

III. THE PLENARY REVIEW MANDATED BY *KOTTEAKOS* ENSURES A FAIR DETERMINATION OF ACTUAL PREJUDICE.

Application of the harmless error doctrine on either direct or collateral review demands that a reviewing court engage in the task of examining the entire record of the criminal trial to determine whether a constitutional error prejudiced the trial's outcome. *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991). This is the practice in direct review cases under *Chapman*, *see Chapman*, 386 U.S. at 56 (Harlan, J., dissenting), and, as Justice Stevens emphasized in *Brecht*, the *Kotteakos* harmless error analysis also requires the federal courts on collateral review to review the entire trial record de novo to decide whether the constitutional error did or did not substantially and injuriously influence or affect the jury's verdict. 113 S. Ct. at 1724. The Court's opinion in *Brecht* conducts such de novo review, see *id.* at 1722-23. *See also id.*, at 1731 (O'Connor, J., dissenting) (observing that federal courts, on collateral review, must conduct review of entire trial record de novo in undertaking harmless error analysis).

As Justice Stevens explained:

> The purpose of reviewing the entire record is, of course, to consider all the ways that an error can infect the course of a trial.

Brecht, 113 S. Ct. at 1724. By virtue of the fact that under the *Kotteakos* standard, just as under the standard in *Chapman*, the federal courts review the state trial record de novo in conducting a harmless error analysis, the courts retain the discretion to make of that record what they will. At each level of review the federal court is free to reach a conclusion on the effect of the constitutional error that is different from the determination reached by the state courts. What this means in terms of the burden allocation issue is that the allocation, while important, will not automatically and necessarily be determinative of whether habeas relief will be granted. The burden allocation becomes one factor of several to consider in this calculus.

Bearing out this contention are *Henry v. Estelle*, 993 F.2d 1423, 1425-27 (9th Cir. 1993) and *Cumbie v. Singletary*, 991 F.2d 715, 724-25 (11th Cir. 1993), two cases where the federal courts of appeal, citing to *Brecht*, allocated to the habeas petitioner the burden of proving that a constitutional trial error was harmful. In both cases the courts nonetheless concluded, after a de novo review of the state criminal trial record, that the error was not harmless and that habeas relief was warranted. Given that the burden allocation will not be dispositive of the question of whether the constitutional error was sufficiently harmful to warrant habeas relief, it is consistent with the equitable concerns underlying habeas review to impose upon the petitioner the burden of proving that the trial error was harmful.

CONCLUSION

For the reasons stated above, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN JR.
Attorney General of Maryland

* TARRA DESHIELDS-MINNIS
Assistant Attorney General
200 St. Paul Place
Baltimore, MD 21202-2202
(410) 576-7901

Counsel for *Amici* States

* *Counsel of Record*
July 1, 1994

Of Counsel:
Eleni M. Constantine
444 N. Capitol St.
Washington, DC 20001